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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

FERNANDO C. et al. Petitioners, v. THE SUPERIOR COURT OF ORANGE COUNTY, Respondent; ORANGE COUNTY SOCIAL SERVICES AGENCY et al., Real Parties in Interest.	G041852 (Super. Ct. No. DP0099775 & DP017687) O P I N I O N

Original proceedings; petition for a writ of mandate to challenge an order of the Superior Court of Orange County, Douglas J. Hatchimonji, Judge. Petition denied.

Juvenile Defenders and Donna P. Chirco for Petitioner C.B.

No appearance for Respondent.

Nicholas S. Chrisos, County Counsel, Karen L. Christensen and Jeannie Su, Deputy County Counsel, for Real Party in Interest Orange County Social Services Agency.

C.B. (hereinafter "mother") petitions for relief from a juvenile court order denying her reunification services with her two children, Monica C. and Michael C., pursuant to Welfare and Institutions Code section 361.5, subdivisions (b)(10)[1] and (b)(13).[2] Mother contends the court abused its discretion in denying services, because she has made reasonable efforts to treat the drug abuse and other problems that led to the removal of Monica and her older brother, Aaron, from her care in an earlier dependency case, and she has not resisted treatment for her past drug abuse. She also asserts that her most recent drug use was merely a short-term relapse, brought on by the loss of her job, and that reunification is in the children's best interests.

We deny the petition. The court specifically found mother was not credible, and thus we must essentially disregard her characterization of her own recent drug use as short term, as well as the other self-serving aspects of her testimony. The court has discretion to evaluate the circumstances of the case, and determine whether they demonstrate mother has made reasonable efforts to treat the problems which led to the earlier dependency proceeding, or has resisted drug treatment during the three-year period prior to the filing of this most recent dependency petition, and we cannot say the court abused its discretion in reaching the conclusions it did.

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[1] All further statutory references are to the Welfare and Institutions Code, unless otherwise indicated.

Subdivision (b)(10) of section 361.5 provides that reunification services can be denied when the court finds, based upon clear and convincing evidence, "[t]hat the court ordered termination of reunification services for any siblings or half siblings of the child because the parent or guardian failed to reunify with the sibling or half sibling after the sibling or half sibling had been removed from that parent or guardian pursuant to Section 361 and that parent or guardian is the same parent or guardian described in subdivision (a) and that, according to the findings of the court, this parent or guardian has not subsequently made a reasonable effort to treat the problems that led to removal of the sibling or half sibling of that child from that parent or guardian."

[2] Subdivision (b)(13) of section 361.5 provides that reunification services can be denied when the court finds, based upon clear and convincing evidence, "[t]hat the parent or guardian of the child has a history of extensive, abusive, and chronic use of drugs or alcohol and has resisted prior court-ordered treatment for this problem during a three-year period immediately prior to the filing of the petition that brought that child to the court's attention, or has failed or refused to comply with a program of drug or alcohol treatment described in the case plan required by Section 358.1 on at least two prior occasions, even though the programs identified were available and accessible."

We also reject the contention the court abused its discretion in reducing the frequency of visitation enjoyed by mother. Because the court had concluded reunification was not the goal of this dependency proceeding, it's determination a reduction in visitation was in the children's best interests did not constitute an abuse of discretion.

FACTS

This case commenced in October of 2007, after Garden Grove Police narcotics officers executed a search warrant for mother's home and car. Although mother was present when the officers arrived at her home, she would not answer the door, and the officers were forced to "breach the door by using a GGPD ram." Once inside, the officers retrieved a pipe and a baggie containing a white, crystalline substance from mother's person, as well as additional methamphetamine, substantial cash, a scale, "pay/owe sheets", and a two other pipes and a "meth bong" in the home. Michael, then an eight month-old infant, was also in the home at the time of the search.

Both Michael and Monica, then age 10, were taken into protective custody, and a jurisdictional petition was filed on October 16, 2008. The petition alleged that Monica and Michael came within section 300, subdivisions (b) [failure to supervise or protect], (g) [incarcerated parent unable to care for child], and (j) [abuse or neglect of sibling]. Specifically, the petition alleged mother had been arrested on October 7, 2008, for cruelty to a child and possession of a controlled substance for sale, and was incarcerated. The children's father, who lived apart from mother, had been arrested on October 14, 2008, on two outstanding warrants and for resisting arrest. He was also incarcerated.

The petition further alleged that mother had an unresolved history of drug abuse since approximately 1993, and had used and sold methamphetamines while caring for the children. Mother also was alleged to have left the children alone in the evenings, for at least two hours, on a twice-weekly basis.

Monica, along with her older brother Aaron, had been the subject of a prior dependency proceeding in 2004, due to "mother's unresolved substance abuse problem, transient lifestyle and history of domestic violence with the father." Mother was offered reunification services, but was unable to reunify with either Monica or Aaron after 18 months, and those services were terminated. Both children were placed in a legal guardianship with the maternal grandparents in March of 2006. Approximately seven months later, in October of 2006, the court granted mother's section 388 petition, finding changed circumstances – ending the grandparents' legal guardianship over Monica, and allowing her to be returned to mother's custody under a plan of family maintenance. Ultimately, the dependency over Monica was terminated in April of 2007. However, mother did not regain custody of Aaron – his grandparents petitioned to end the guardianship in February of 2008, "due to their inability to control his negative behaviors." In May of 2008, the court terminated the guardianship and Aaron subsequently became a ward of the court under section 602.

At the October 17, 2008 detention hearing, the Orange County Social Services Agency (SSA) offered evidence that while Monica claimed not to know what drugs looked like, and denied witnessing domestic violence, she did acknowledge that mother would sometimes leave her and Michael alone at night. Mother admitted to using drugs only during the prior two-month period since she had lost her job, but denied any current domestic violence and denied leaving the children alone.

The court detained the children, who were placed with their maternal grandparents, and SSA recommended denying reunification services to both parents, based upon section 361.5, subdivisions (b)(10) and (b)(13).

The dispositional hearing was held on March 24, 2009. SSA reported that mother, who was then pregnant with her fourth child, was no longer incarcerated, and had enrolled in a perinatal substance abuse program on January 28, 2008. She was described by the program counselor as "motivated," and had not missed any groups or had any

positive drug tests. However, SSA noted that mother also had a history of drug treatment and repeated relapses – she had participated in the perinatal program two times previously, completing it only one of those two times, and had also participated in a Penal Code section 1000 drug program[3] and a Proposition 36 drug treatment program, through the criminal court.

The social worker testified that mother's repeated drug relapses demonstrated an "inability to remain clean and sober and provide a safe drug-free home for the children." The social worker acknowledged that mother had been able to successfully maintain her sobriety for limited periods in the past, and had apparently been able to do so during the two months since she had been released from incarceration, but the social worker did not believe those periods warranted additional reunification efforts. As she explained, mother's transgressions in this most recent instance were particularly disturbing, since she was not only exposing the children to her own drug use, but had also been inviting other drug users into her home for the purpose of selling drugs. "[J]ust in terms of supervision, you're not always there, mentally, when you are using a controlled substance. [¶] Much less having different individuals come out at the home who, themselves, are there to purchase drugs which means you are also under the influence of some sort of drug, exposing your children to them, that exposes them to unpredictable behavior, criminality, danger in general."

In lieu of calling Monica to testify, the court accepted a stipulation to the effect that Monica loves and misses her mother, enjoys their visits, wants to live with her, and wishes for mother to get better.

Mother then testified. She acknowledged that her children had been removed from her care due to her drug use and drug sales out of the home. She took responsibility for her children being detained. Mother admitted she had long-standing

[3] Penal Code section 1000 allows certain first-time drug offenders to be diverted into drug treatment, rather than being prosecuted for their offense.

issues with drug abuse, commencing in high school, and had participated in treatment in the past. She stated that after her children, Aaron and Monica, had been taken from her in 2004, she participated in a perinatal drug program, which she completed in 2005. At the same time she participated in the perinatal program, mother also completed a Penal Code section 1000 drug program. She participated in Narcotics Anonymous (NA) as well, but completed only 6 of the 12 steps in that program, and did not continue with it after her completion of the other programs.

Mother then relapsed almost immediately, and was arrested for possession of drugs approximately 30 days after she had completed the perinatal and Penal Code section 1000 programs. She stated her "triggers" for drug use had been "old friends," as well as "neighborhoods, areas that I previously used in or with people, people that I used with. Stress, depression." She explained that her relapse had occurred because she "got out of the program thinking that I could control the issue that I had ahead of me. Probably – it was probably because I had reservations of doing that, in getting through the program and using."

After that arrest, mother participated in a drug treatment program under the provisions of Proposition 36, and re-enrolled in a perinatal drug program. She described the Proposition 36 program as less "structured" than the perinatal program. She was subsequently terminated from the perinatal program, for missing classes and drug tests, but completed the Proposition 36 program in 2006.

Mother admitted she again relapsed, claiming it happened in May of 2008, after losing her job. She described that relapse as again being triggered by "old friends": "Financially I had no money. I ran into some old friends. And given the opportunity to make money selling drugs, I kind of justified that as my relapse, as a reason to relapse." And mother once again attributed her relapse in part to her decision to attempt sobriety without relying upon a support network: "I had lost contact with my support group; I had stopped going to NA meetings. I was under the impression that I could control the issue

that I had in front of me and not – and now seeing that it was a much bigger problem than I could control myself and on my own."

Mother also testified, in a somewhat inconsistent manner, about her decision to ignore and violate the domestic violence restraining order which had been imposed against the children's father in connection with the earlier dependency case, and her choice to reestablish contact with him in 2007, even while he remained in prison. She first tried to characterize the restraining order as nearly expired at the time she began violating it, in an attempt to justify her failure to make any effort to have it modified. It was only after being confronted with the relevant dates, that mother acknowledged the order had nearly two years remaining at the time she violated it. She then conceded she had not attempted to modify the order because "for the judge to modify it, I would have had to attend[] some type of classes. At that time I didn't have time . . . ."

Mother also acknowledged that back in 2006, when she petitioned the court pursuant to section 366 for a modification of its order placing Monica under the long-term guardianship, she had signed a declaration promising not to allow any unauthorized contact between the father and Monica. Despite that promise, she then allowed such contact beginning in 2007, and even allowed father to live with them in 2008.

She also gave conflicting testimony about the number of times she had been incarcerated, first claiming it had been only one time, and later acknowledging that the one time she had referred to meant only her single "long-time" incarceration, and that if she included the shorter periods as well, her total number was probably four incarcerations – all drug related.

Mother also gave conflicting testimony about her relationship with the woman who had been her NA sponsor back in 2005. That woman had left the state for personal reasons, which terminated the sponsorship relationship, which was allegedly a significant factor in mother's failure to continue with NA at that time. When that woman later returned to California in 2006, mother reestablished contact, but the woman did not

resume the role of mother's NA sponsor. However, in 2006, when mother petitioned the court for the modification of Monica's long-term guardianship, she characterized the woman as her NA sponsor in her supporting declaration – clearly implying that the sponsorship relation was a *current* one – and claimed that they maintained "daily" contact at that time.

After some attempts to explain away the discrepancies between her 2006 characterization of her supposed relationship with her NA "sponsor," and the reality of her relationship with that woman at the time, mother finally agreed that she had been "misleading or flat out untruthful in stating that [she] maintained contact and had daily contact with [her] sponsor, Debbie Hart."

At the conclusion of evidence, the parties argued whether reunification services should be provided. Among other things, SSA argued that section 361.5, subdivision (b)(10) applied because mother had failed to reunify with Monica and Aaron in the prior dependency case, and that the evidence demonstrated she had failed to make reasonable efforts to treat *two* of the problems which had led to that earlier dependency: drug abuse and domestic violence. With respect to the latter issue, SSA pointed out that mother had not made reasonable efforts to protect the children from domestic violence, because she chose to ignore the court-ordered restraining order and "simply believes that father doesn't have a problem anymore . . . ."

SSA also argued services should be denied pursuant to section 361.5, subdivision (b)(13), because "resistance" to court-ordered treatment includes not only refusing to participate or cooperate in treatment, but also relapsing or resuming a drug-abusing lifestyle after treatment has ended.

Although mother disputed SSA's characterization and interpretation of the evidence, the court agreed with it, and based its denial of services on the same reasoning employed by SSA. In explaining its decision, the court explicitly found that mother was not credible. The court then noted that "the record . . . does not reveal any efforts to treat

either drug abuse or domestic violence issues that arose in the 2004 case," and explained that mother's decision to sell drugs more than qualified as "resistance" to her prior court-ordered drug treatment: "Drug sales . . . [is] not simply a failure to internalize the lessons of the PC 1,000 or Prop. 36 or the perinatal program. [¶] Drug sales, in this court's mind, is thumbing your nose in open defiance of everything those programs stood for. Drug sales, in this court's mind, is not simply resistance to drug treatment, but it is actively, consciously and intentionally contributing to and fueling the fire of drug addiction, not only for mother in this instance, but the people with whom she dealt drugs. [¶] It is not just simply resistance. It's contributing to the problem, and to that extent, in this court's mind, represents resistance – active resistance to drug treatment." The court found that mother's history of misconduct, including her misleading statements in support of her section 388 petition in the prior dependency proceeding, indicated she was "simply [going] through the motions in order to regain custody."

The court also concluded that reunification was not in the children's best interest, explaining that "at some point in time . . . these children need to be taken off the merry-go-round. And I've got to tell you, as soon as you start selling, it's a different thing. . . . And I'm not good with these two kids going down that road with either parent."

With respect to visitation, counsel for the minors argued the frequency should be reduced from twice per week, plus mother's attendance at Monica's soccer games, to twice per month, plus soccer games. Counsel pointed out that with the denial of reunification services, the goal was no longer to reunify the family. Instead, the only issue was whether more, or less, frequent visitation would be in the children's best interest in light of the court's decision to proceed directly to a section 366.26 permanency planning hearing. Minors' counsel believed that less visitation would be in the children's best interest, since it would be less disruptive, although she agreed that mother's attendance at soccer games was not disruptive, was enjoyed by Monica, and should

continue. SSA joined in the request to reduce the visitation. The court agreed that visitation should be reduced, and concluded it would be in the children's best interest to restrict visitation to once per week, plus mother's attendance at soccer games.

I

"Section 361.5, subdivision (b) lists a number of situations in which reunification services are likely to be futile and need not be offered to a parent. (*In re Kenneth M.* (2004) 123 Cal.App.4th 16, 20.) These exceptions to the general rule reflect a legislative determination that in certain situations attempts to facilitate reunification do not serve the child's interests. (*In re William B.* (2008) 163 Cal.App.4th 1220, 1228.) When the juvenile court determines by clear and convincing evidence that one of the enumerated situations exists (§ 361.5, subd. (b)), reunification services shall only be ordered if 'the court finds, by clear and convincing evidence, that reunification is in the best interest of the child' (§ 361.5, subd. (c))." (*D.B. v Superior Court* (2009) 171 Cal.App.4th 197, 202.)

In reviewing the juvenile court's decision to deny services, we are constrained by the usual standards: "In juvenile cases, as in other areas of the law, the power of an appellate court asked to assess the sufficiency of the evidence begins and ends with a determination as to whether or not there is any substantial evidence, whether or not contradicted, which will support the conclusion of the trier of fact. All conflicts must be resolved in favor of the respondent and all legitimate inferences indulged in to uphold the verdict, if possible. Where there is more than one inference which can reasonably be deduced from the facts, the appellate court is without power to substitute its deductions for those of the trier of fact." (*In re Katrina C.* (1988) 201 Cal.App.3d 540, 547.)

In particular, we are bound by the juvenile court's assessment of credibility. (*In re David M.* (2005) 134 Cal.App.4th 822, 828 ["In our review, we have taken into

consideration the juvenile court's finding that mother 'has given false testimony on material points,' and therefore have discounted mother's testimony."].)

And when, as in this case, the court bases its challenged decision on two separate statutory provisions, either of which, standing alone, would constitute a sufficient basis to support its order, we must affirm the decision if we conclude that *either* basis is supported by substantial evidence. (*In re Jonathan B.* (1992) 5 Cal.App.4th 873, 875-876; *In re Steven A.* (1991) 230 Cal.App.3d 349.)

II

In this case, substantial evidence supports both statutory bases cited in support of the court's denial of services. First, with respect to section 361.5, subdivision (b)(10) [failure to reunify with child in a prior dependency], it is undisputed that mother failed to reunify with either Monica or Aaron during the 18-month maximum period allowed for reunification services in the earlier dependency case. She did, *at a later point*, persuade the court to return custody of Monica to her, but she did so by misrepresenting material facts. And she never regained custody of Aaron. As the trial court noted, mother conceded this aspect of the subdivision (b)(10) exception to reunification.

So the only disputed issue with respect to the subdivision (b)(10) exception was whether mother had "subsequently made a reasonable effort to treat the problems that led to removal of the [child]" in that prior case. And the evidence was more than sufficient to support the court's conclusion she had not. As the court made clear, the fact mother chose to engage in *drug sales* was sufficient, in and of itself, to demonstrate she had not made reasonable efforts to treat the problems that had led to removal of her children in the earlier case. Choosing to become a drug dealer demonstrated mother was actively *embracing*, rather than resisting, the drug lifestyle.

Moreover, mother's own testimony demonstrated she had never done anything beyond what was absolutely required of her to address her drug problem. She

participated in drug programs as ordered by courts, and completed them. But she abandoned any such efforts, such as continuing to participate in NA, as soon as she was able to. She attributed her 2005 relapse to contact with "old friends," and a failure to maintain a sober support network. Yet, when she got sober again in 2006, she did the same thing. And in both cases, she acknowledged that part of the problem was that she simply lacked the commitment to sobriety. She went so far as to characterize her job loss in 2008 as a "justification" for resuming her drug lifestyle.

Stated simply, the evidence in this case was more than ample to support the conclusion mother was making almost *no effort* to address her drug dependency. Her pattern was to (1) embrace it; (2) engage in treatment and sobriety as required by court order when caught embracing it; (3) ignore it for some period of time; and (4) embrace it. There was certainly no evidence presented which was sufficient to compel the conclusion this go-round would not be another merry-go-round. Consequently, the court did not abuse its discretion in concluding the subdivision (b)(10) exception to reunification should be applied.

Having concluded that the denial of services was justified based upon subdivision (b)(10), we need not address the subdivision (b)(13) exception [resistance to drug treatment within prior three years]. Nonetheless, we would have to conclude the denial was justified on that basis as well.

It is undisputed that mother's drug dependency problems are of long duration; she admitted she began using in high school. And the evidence of her "resistance" to treatment during the three years prior to the filing of the petition in this case is plenary – she was not only using drugs, but *selling them.*

As this court made clear in *Randi R. v. Superior Court* (1998) 64 Cal.App.4th 67, "resistance" to treatment does not only mean a resistance to *participating* in programs. It can also mean a history of repeated treatment and relapse, as occurred in this case, even though the treatment programs themselves were successfully completed

more than three years previously. In explaining why the mother in that case was properly denied services, the panel reasoned that "[a]lthough she previously completed two programs between 1991 and 1995, she relapsed within one year on both occasions. She has made at least four attempts at rehabilitation, each one ultimately failing when she returned to substance abuse. . . . Thus, while she has technically completed rehabilitation programs, her failure to maintain any kind of long-term sobriety must be considered resistance to treatment. [¶] Under these circumstances, acceptance of Randi's definition of the term 'resist' would narrow the statute to the point of absurdity: A parent could repeatedly go through the motions of rehabilitation just long enough to regain custody of his or her child only to immediately revert to substance abuse and avoid the denial of services. We are convinced the Legislature did not intend to place such a limit on the juvenile court's discretion." (*Id*. at p. 73; see also *In re William B.* (2008) 163 Cal.App.4th 1220, 1230; *In re Brian M.* (2000) 82 Cal.App.4th 1398, 1402; *Laura B. v. Superior Court* (1998) 68 Cal.App.4th 776, 780.)

As the trial court made clear, mother's decision to not only use drugs, but become a drug dealer as well, demonstrates a particularly aggressive "resistance" to the lessons of her drug treatment programs. She had not only given up her battle against drugs, but had actually changed sides in the war. The court did not abuse its discretion in concluding the subdivision (b)(3) exception to reunification services applied in this case.

Nor can we agree the court abused its discretion in concluding reunification services were not in the children's best interests. "A juvenile court has broad discretion when determining whether further reunification services would be in the best interests of the child under section 361.5, subdivision (c)." (*In re William B.* (2008) 163 Cal.App.4th 1220, 1229.) The court expressed its views well, and we need not belabor them. It is sufficient to note that mother was dealing methamphetamine, out of her home, where her children lived. Under those circumstances, the fact Monica loved and missed mother was

not a sufficient basis to compel reunification efforts.[4] There was ample evidence to support the court's conclusion mother was the sort of serial offending parent who would say, and do, whatever it took in the short term to regain custody of her children – and then resume her drug lifestyle. In light of that conclusion, we cannot say the court abused its discretion in concluding it was time for these children to exit the merry-go-round.

III

Mother's final contention is that the court erred in reducing the number of her visits, from twice per week, plus attendance at Monica's soccer games, to once per week, plus attendance at the soccer games. We are not persuaded.

Monica first relies upon *In re Julie M.* (1999) 69 Cal.App.4th 41, 49, for the proposition that "[a]n obvious prerequisite to family reunification is regular visits . . . ." But in this case, the court reduced the visitation only after concluding reunification would not be the goal of this proceeding, so *Julie M.* is not instructive.

Monica also relies upon *In re Hunter S.* (2006) 142 Cal.App.4th 1497, for the proposition that visitation is required, even after services are terminated, unless the court finds it would be detrimental. But *Hunter S.* is based upon section 366.21, subdivision (h), which merely prohibits *outright denial* of visitation, absent a finding of detriment, after reunification services have been terminated or denied and a section

[4] Mother also asserts it was a denial of due process for the court to refuse her request to call Monica as a witness. She cites no cases suggesting she had a due process right to compel her then-11-year-old child to testify in this very difficult situation, over the objection of the child's counsel, when all other parties had stipulated to the content of her expected testimony. To the extent the court deemed that testimony to be relevant (and SSA contended it was not), it was free to consider that stipulation. In light of those circumstances, mother does not explain how she was prejudiced by the omission of Monica's testimony. In lieu of calling Monica to the stand, the parties stipulated that she loved mother, missed her, and wanted to live with her again. The court then presumed those facts to be true. Mother does not suggest there were any additional findings the court might have made in her favor had Monica actually testified. Nor is there any reason to infer that even the most persuasive testimony from Monica might have convinced the court it was in her best interest to attempt reunification with a parent the court had otherwise concluded was either unwilling or unable to care for her. Consequently, we find mother's assertion unpersuasive.

366.26 hearing has been scheduled. The court here did not deny visitation; it only reduced the frequency. Consequently, mother has failed to demonstrate any error in the court's ruling.

BEDSWORTH, J.

WE CONCUR:

SILLS, P. J.

FYBEL, J.